THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

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Case No. 2012-212109

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Susan Anne Bell Lynch,

Appellant/Respondent

v.

Carolina Self Storage Centers, Inc.,

Respondent/Appellant.

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# INITIAL BRIEF OF APPELLANT/RESPONDENT

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V. EVEN IF NO ONE ERROR ALONE WARRANTS A NEW TRIAL, THE CUMULATIVE EFFECT OF THE MULTIPLE ERRORS DEPRIVED APPELLANT OF A FAIR TRIAL.

## STATEMENT OF THE CASE

Susan Anne Bell Lynch (hereinafter "Appellant") commenced this action by the filing of a Summons and Complaint on July 26, 2010, alleging that she suffered damages arising from an accident that occurred on the premises of Carolina Self Storage Centers, Inc. (hereinafter "Respondent") on July 31, 2008. Appellant was an invitee on Respondent's premises, and alleges that Respondent was negligent, wilful, wanton and reckless in failing to discover and remedy an unreasonably dangerous condition or in the alternative, failing to warn Appellant of that condition. Respondent filed an Answer and Counterclaim in which it interposed a general denial to Appellant's allegations, and raised the defenses of comparative negligence, assumption of the risk, waiver and estoppel. Respondent also counterclaimed against Appellant for monetary damages alleging that the Lease Agreement for Appellant's storage unit required Appellant to indemnify Respondent for any losses or attorney's fees and costs incurred in defending an action for personal injuries.

The case was called for trial on March 5, 2012. During the Voir Dire process, two (2) of the members of the Jury Venire indicated to the Court that they had had prior litigation issues with Appellant's counsel and his law firm. Specifically, Juror Thompson had been represented by Appellant's counsel in his divorce a number of years prior to the trial. The second juror, Mr. Jerry Burns, indicated that his wife "had a lawsuit against" the partner of Appellant's counsel. The Court on its own, set those jurors aside for the trial of this case.

After the jury was empanelled, the Court entertained Motions, one of which included a Motion for Summary Judgment for Appellant regarding Respondent's Counterclaim on the basis that the Lease Agreement did not, as a matter of law, include a valid waiver of Appellant's right to file an action for personal injuries in this matter. The Court granted the Motion for Summary Judgment in Appellant's favor on the Counterclaim, and the case

proceeded to trial on Appellant's negligence claim, and Respondent's affirmative defense of comparative negligence.

During the trial of the case, Appellant attempted to introduce into evidence Respondent's Answers to Appellant's Interrogatories which indicated that Respondent had no photographs, and which listed as a potential witness Respondent's former employee/manager, Dan Comfort. The discovery responses gave no contact information, and his address was listed simply as "New Jersey". (Def.'s Ans. to Plf.'s Int. 2-4).

Even though employees of Respondent had contacted Mr. Comfort at his new place of employment regarding issues unrelated to this litigation, Respondent claimed this witness was only located the week prior to trial, and scheduled his deposition on Friday prior to the commencement of the trial on Monday. The deposition was held by telephone, per Court Order. During the deposition, Mr. Comfort testified that Respondent had his contact information the entire time (in the Boston, Massachusetts area), and in fact, had contacted him on a number of occasions regarding issues unrelated to this litigation, but which involved Respondent's storage facility in Florence. This witness also testified that the President of Respondent's corporation was told about photographs that were taken by the witness shortly after the accident, and according to the witness, the President told him to "get rid of them". (Trial Tr. 256, 260). Mr. Comfort "knew it was not right" to destroy evidence, so he placed the photographs in a drawer in the lunch room on Respondent's premises. (Trial Tr. 256). The photographs were still on Respondent's premises when Mr. Comfort left its employ. (Trial Tr. 257).

Appellant attempted to introduce into evidence Respondent's Answers to Appellant's Interrogatories, specifically the allegedly incorrect/incomplete answers regarding Mr. Comfort's location and contact information, as well as the fact that photographs were taken and not disclosed. The Court did not allow the introduction of this evidence.

Additionally, Appellant sought to introduce into evidence documentation and testimony that upon Appellant notifying Respondent of her desire to have an expert witness view the scene and conduct an investigation, that Respondent immediately evicted her from the premises. It is undisputed that Appellant was current in her rent, and had not violated any of the terms of her Lease Agreement. Again, the Court found this evidence not relevant, and would not allow its introduction.

At the conclusion of Appellant's case, and again at the conclusion of the entire case, both parties moved for directed verdicts in their favor. These Motions were denied by the Court.

At the conclusion of the trial, the case was submitted to the jury on Appellant's claim for actual and punitive damages. The jury returned a verdict Appellant in the amount of Two Hundred Forty Six Thousand, Sixty Eight and 42/100 Dollars ($246,068.42), but found that Appellant was 50% at fault in bringing about the accident. The Court then reduced the verdict by 50%, thus entering a verdict for Appellant in the amount of One Hundred Twenty Three Thousand, Thirty Four and 21/100 Dollars ($123,034.21).

Both parties made Post Trial Motions, including Appellant's Motion for New Trial based on the facts raised by the Foreperson's Affidavit to the Court. The Court denied all Post Trial Motions by written Order filed on May 18, 2012.

Appellant then appealed the denial of her Post Trial Motions by Notice of Appeal dated May 31, 2012. Respondent then filed its own Notice of Appeal.

## STATEMENT OF FACTS

This is a premises liability case arising from an accident that occurred on July 31, 2008, at Respondent's self storage facility in Florence, South Carolina. Appellant was going through an acrimonious divorce and needed a storage unit to store her personal belongings

until she found a home to purchase. After investigating storage facilities, she chose this particular location because of its security cameras and safety features, and the fact that they offered a suitable climate controlled unit for her belongings. Appellant signed a Lease Agreement for her unit, and moved her belongings into that unit.

Appellant's unit was located within an enclosed building, and was accessible by entering an unlocked exterior door. The exterior door had an automatic closing mechanism on it, but no mechanism that would allow the door to be locked in the "open" position while moving items in and out of the facility. To access Appellant's actual unit, she would enter the exterior door, walk down two halls, and raise the roll down door to her unit. The exterior door used by Appellant to access her unit was metal, with a "bare sheet metal edge" (Trial Tr. 297) at the bottom and was raised above the ground between two (2) to three (3) inches and five (5) inches depending on where the door was in its closing cycle. (Trial Tr. 294) At the time of the accident, the door closed with a "closing force" of between fourteen (14) and twenty-six (26) to twenty-seven (27) pounds. (Trial Tr. 301) The closing speed of the door, also known as the "sweep speed", can be adjusted by turning the "sweep valve adjustment screw". (Trial Tr. 295)

On July 31, 2008, Appellant started moving her personal property items from her storage unit to a new home, and began loading items into her vehicle. She did not have any other persons assisting her on this occasion. In order to assist her in moving the items more efficiently, Appellant blocked the door open with a small table. Respondent's employees were aware of this practice and had observed tenants blocking doors open with items such as cinder blocks and small items of furniture. Even though this door closes quickly and can hurt people, Respondent's employees do not stop people from using this practice. (Trial Tr. 258-59). Instead, the tenants are told to be sure "the weight is sufficient to keep the door open" (Trial Tr. 259), but not to open so far as to destroy the closer.

Appellant made a number of trips to and from her storage unit to her vehicle, each time carrying a number of smaller items. After loading all of the items into her vehicle, Appellant picked up the table and turned to put it into the back of her car. Once the table was removed, the door's automatic closing mechanism began closing the door. Appellant "could feel the door closing fast" (Trial Tr. 132-33) so she attempted to stop the door from closing on her by putting up her the heel of her foot. She did this "instinctively....so it wouldn't knock me over. This is a metal door and it is heavy". (Trial Tr. 133) Instead of the door hitting the bottom of her foot, due to the door's height from the ground, the bottom edge of the door sliced her Achilles Tendon area of her heel causing a gaping wound.

Appellant wrapped her ankle with paper towels and immediately drove home. Due to the significant amount of bleeding, Appellant did not stop at Respondent's office to report the injury. When Appellant arrived at her house, Carol Dawson, a neighbor and friend suggested that she be immediately treated by her husband, Dr. Al Dawson, an orthopaedic surgeon. (Trial Tr. 135-36). Appellant went to Dr. Dawson's office and was stitched up and given pain medication. Appellant was instructed to "go home and have a relatively easy weekend...and keep your foot up as much as you can". (Trial Tr. 138) . Dr. Dawson described the injury as a jagged injury. (Trial Tr. 376). He further observed that this was an injury "that went to the tendon basically" (Trial Tr. 377), and that once you cut the skin and disrupt the blood supply the tendon is "weakened" (Trial Tr. 377). Because of the nature and location of the injury, Dr. Dawson was "worried at day one" about a "skin problem", and prescribed an antibiotic. (Trial Tr. 378). The Appellant was told by Dr. Dawson to "protect the wound...elevate it some and things of that sort". (Trial Tr. 378-79).

Two days after the accident, Appellant had a friend drive her to Respondent's place of business to pay her monthly rent. (Trial Tr. 138). When Appellant arrived at the storage facility, she reported the accident and paid her rent. The employee, Dan Comfort, took a

couple of pictures of Appellant's ankle and gave her an incident report to fill out and return. (Trial Tr. 139-140).

The following day, Appellant had promised her son she would feed his dogs. Although it had been raining that day, Appellant travelled to the son's house and attempted to ascend the stairs to feed the dog. She was not putting any weight on her injured ankle, instead hopping up the steps. As she moved to the second step, she fell (Trial Tr. 144) and heard a "pop". Appellant thought she had popped her stitches, so she called a friend and Dr. Dawson. As a result of those calls, Appellant appeared at Dr. Dawson's office on that Monday morning. Surgery on the Achilles Tendon was immediately scheduled and accomplished. During that surgery, the physicians determined that Appellant's Achilles Tendon was completely torn (Trial Tr. 381).

On September 3, 2008, Appellant returned to Dr. Dawson's office because the cast had gotten wet in the shower. Dr. Dawson noted that "some of the edges of the skin had turned black." (Trial Tr. 389). He opined the original injury was the cause of that condition. (Trial Tr. 389). Appellant was referred to a plastic surgeon, who performed additional surgeries on Appellant including skin grafts, the final one being completed in November of 2008. As a result of Appellant's medical treatment, Appellant incurred medical expenses totalling $246,068.42. She also has a scar on her ankle, and some physical limitations.

Appellant alleges that the injuries and damages outlined above are the direct and proximate result of the Respondent's negligence. Appellant's expert witness, Kristopher Seluga, has a degree in mechanical engineering from MIT, and a Master's Degree of Science from MIT, and testified the "setup" of this particular door was a dangerous condition that should have been corrected. More specifically, Seluga opined that the combination of the closing speed of the door, the height of the door bottom off of the ground, and the sharpness of the metal bottom constituted an unreasonably dangerous condition that proximately caused

the injury to Appellant. He further opined that had the door been set to close more slowly, the "force" of the door hitting Appellant would not have been significant enough to cut her. (Trial Tr. 315). Additionally, he testified that the injury most probably would have been avoided had Respondent either built the door closer to the ground itself, or had some type of covering over the bare metal bottom. Any of these three changes would have most probably avoided Appellant's injury. Based on the fact that the combination of factors was present, Seluga opined that this door violated the ANSI Building Standards. (Trial Tr. 319-320).

## ARGUMENT

**I. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FAILING TO ALLOW APPELLANT TO INTRODUCE INTO EVIDENCE THE RESPONDENT'S DISCOVERY RESPONSES AS WELL AS EVIDENCE THAT THE RESPONDENT INTENTIONALLY PROVIDED EVASIVE AND INCOMPLETE INFORMATION REGARDING A CRITICAL WITNESS AND EVIDENCE, WHEN SAME WAS CLEARLY RELEVANT ON A NUMBER OF ISSUES INCLUDING PUNITIVE DAMAGES.**

**A. The Trial Court erred as a matter of law when it ruled that Appellant could not publish to the jury Respondent's answers to certain interrogatories.**

Rule 33(d) of the South Carolina Rules of Civil Procedure specifically provides that answers to interrogatories may be used at trial "to the extent permitted by the rules of evidence." Furthermore, this Court has expressly recognized that Rule 33(d) allows a party "to publish [an] interrogatory answer as substantive evidence." Camlin v. Bi-Lo, Inc., Store No. 2, 311 S.C. 197, 200, 428 S.E.2d 6, 7 (Ct. App. 1993) (citing Rule 33(d), S.C.R.C.P.).

In our case, this is precisely what Appellant sought to do. Respondent's answers to two specific Interrogatories were at issue. The two interrogatories and respective answers related to the location of a critical witness, Dan Comfort, and the existence of any photographs of Appellant's injuries. Dan Comfort worked at Respondent's storage facility at the time of the accident in question and had interactions with Appellant in the days following her injuries. Respondent indicated in its Answers to Appellant's Interrogatories that the only

information it had regarding Dan Comfort's location at the time was that he was in "New Jersey." (Def.'s Ans. to Plf.'s Int. 2). Similarly, Respondent indicated in its Answer to Interrogatory Number Two (2) that the only photographs it had were of the accident scene. (Def.'s Ans. to Plf.'s Int. 3-4). However, Respondent then produced Dan Comfort less than one (1) week prior to the trial's start date, and the Trial Court ordered that his deposition be taken by telephone. During Comfort's deposition, he not only testified that he had taken photographs of Appellant's injuries and placed them in her file, but that Respondent's president had instructed him to "get rid of them." (Comfort Depo. 23). Even more, Comfort testified that his contact information had not changed since he left his position with Respondent and that employees of Respondent had contacted him since he moved to the northeast. (Comfort Depo. 17-18). At trial, Appellant sought to publish Comfort's Deposition to the jury, and further to publish Respondent's Answers to the above Interrogatories. Appellant argued that the interrogatory answers were relevant to a number of issues, most notably the issues of credibility punitive damages which Appellant argued was based on Respondent's handling of her claim and **trial by ambush tactics**.

The Trial Court refused to allow Appellant to publish to the jury Respondent's Answers to the two (2) Interrogatories. Specifically, the Trial Court stated more than once that "potential discovery violations are something that the Court should make a decision on," (Trial Tr. 233) and that it did not "think that's an issue to inflame the jury about or attempt in punitive issues for the jury to make a decision on," (Trial Tr. 220). Ultimately, the Trial Court ruled that Respondent's Answers to the Interrogatories were "potential discovery violations," and that the Court was "not going to allow the publication of those to the jury." (Trial Tr. 233).

The Trial Court erred as a matter of law when it ruled that Appellant could not publish the Answers to the Interrogatories. Rule 33(d) specifically provides that interrogatories may

be utilized at trial, and this Court in Camlin affirmed a trial court that allowed a plaintiff to publish answers to interrogatories for the exact purpose for which this Appellant sought to do the same. In Camlin, the defendant "answered an interrogatory by stating [it] had no knowledge of any person who may have taken a picture of [the plaintiff's] accident scene," but then "relied heavily" at trial on a photograph discovered later in discovery. Camlin, 311 S.C. at 199, 428 S.E.2d at 7. The Court of Appeals concluded that the trial "judge did not err in allowing Camlin to publish the interrogatory answers as substantive evidence." Id. at 200, 428 S.E.2d at 7. Thus, when the Trial Court in our case ruled that the interrogatory answers were for the Court to decide, and not for publication to the jury, it erred as a matter of law.

**B. The Trial Court erred and abused its discretion when it ruled that Respondent's discovery answers and evidence regarding the location of and existence of critical witnesses and photographs were not relevant.**

As discussed above, Appellant contends that the Trial Court erred as a matter of law when it ruled that Appellant could not publish to the jury certain discovery responses of Respondent. In addition to that argument, to the extent that the Trial Court's rulings were based on relevancy determinations, Appellant maintains that those same determinations resulted in an abuse of discretion.

"Evidence is relevant and admissible if it tends to establish or make more or less probable some matter in issue." Johnson v. Horry Cnty. Solid Waste Auth., 389 S.C. 528, 534, 698 S.E.2d 835, 838 (Ct. App. 2010) (citing Rules 401 & 402, S.C.R.E.). However, even relevant evidence may be excluded when "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Rule 403, S.C.R.E. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." Johnson, 389 S.C. at 534, 698 S.E.2d at 838 (internal quotations and citations omitted). On appeal, the "appellate court reviews Rule 403 rulings pursuant to an

abuse of discretion standard and gives great deference to the trial court." Lee v. Bunch, 373 S.C. 654, 658, 647 S.E.2d 197, 199 (2007).

In addition to Respondent's discovery responses that were thoroughly discussed above in Section I(A), the Trial Court also refused to admit other evidence that Appellant argued went to Respondent's credibility and the issue of punitive damages. Most notably, the Trial Court similarly excluded those portions of Mr. Comfort's deposition testimony which related to whether Respondent knew of Mr. Comfort's location and contact information during the discovery stage of this case. Specifically, Mr. Comfort testified he never changed his contact information from when he was employed with Respondent and further that employees of Respondent had contacted him more than once since he left his employment with Respondent. (Comfort Depo. 17-18). Again, despite this fact, Respondent still indicated to Appellant during discovery that all it knew regarding Mr. Comfort was that he was in "New Jersey." (Def.'s Ans. to Plf.'s Int. 2). Then, with only one (1) week remaining until trial, Respondent was able to produce Mr. Comfort. This evidence, along with Respondent's discovery responses and other similar evidence, is both relevant and crucial to Respondent's credibility and the issue of punitive damages.

First, there can be no better evidence as to a witness's credibility than evidence showing that that particular witness hid the location or contact information of another key witness. Appellant contends this is precisely what occurred in this case. Respondent indicated in its discovery responses that it did not have the address or contact information for Mr. Comfort, nor did it have any photographs of Appellant's injuries, then Respondent miraculously produces Mr. Comfort only days before trial, after which Mr. Comfort testifies at his deposition that Respondent knew where he was located all along and actually instructed him to "get rid of" the photographs that he had taken of Appellant's injuries. (Comfort Depo. 23). In a trial where the credibility of both Appellant and the employees of Respondent was

paramount to the outcome, the probative value of evidence tending to show that Respondent misled Appellant regarding the location and contact information of a key witness substantially outweighs any prejudice or confusion that it may have caused. The Trial Court erred in ruling that the same was not relevant.

Second, this same evidence was also relevant to the issue of punitive damages, which the Trial Court allowed to go to the jury. In reviewing the constitutionality of an award of punitive damages, the court must review eight factors to determine if the "punitive damages award comports with due process." James v. Horace Mann Ins. Co., 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006) (citing Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991)). The eight Gamble factors include the "(1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; . . . and (8) other factors deemed appropriate." James, 371 S.C. at 194-95, 638 S.E.2d at 671 (citing Gamble, 305 S.C. at 111-12, 406 S.E.2d at 354). In addition, a trial court must also determine the reasonableness of an award of punitive damages by examining (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the possible civil penalties imposed or authorized in similar cases. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575, 116 S. Ct. 1589, 1598-99, 134 L. Ed. 2d 809, 826 (1996). While Appellant concedes that the jury did not award any punitive damages in this matter, Appellant contends that this was due to the Trial Court's refusal to admit evidence relevant to Respondent's reprehensibility and course of conduct. As discussed throughout this brief, Respondent misled Appellant as to the location of and contact information for a key witness all the way up until one (1) week before trial. Respondent indicated during discovery, and maintained from that point forward, that it did not have any information on Dan Comfort except for the

fact that he was located in "New Jersey." However, as Mr. Comfort testified in those portions of his depositions that the Trial Court improperly excluded, other employees of Respondent had contacted him regarding matters unrelated to this litigation, but involving Carolina Self Storage. (Comfort Depo. 17-18). Mr. Comfort is one (1) of the only individuals to have personally interacted with Appellant in the days immediately following her accident. It has been Appellant's argument from the very beginning of this case that Respondent made continuous attempts to thwart Appellant's recovery after she suffered her injuries. The Trial Court allowed other similar evidence into the record, such as Mr. Comfort's testimony that he was instructed to "get rid of" the photographs he had taken of Appellant's injuries. (Comfort Depo. 23). This type of evidence is relevant to punitive damages and supports the fact that the duration of Respondent's reprehensible conduct was on-going. The evidence that the Trial Court excluded—i.e, Respondent's discovery responses and portions of Mr. Comfort's deposition testimony—was relevant to and served to buttress these same arguments. Thus, the Trial Court abused its discretion when it excluded this additional evidence relevant to the issue of punitive damages.

In sum, the Trial Court abused its discretion by excluding evidence that was relevant to both Respondent's credibility, and its reprehensibility and duration of conduct as it relates to the issue of punitive damages.

**II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO ALLOW APPELLANT TO INTRODUCE INTO EVIDENCE THE DOCUMENTATION SURROUNDING RESPONDENT'S EVICTION OF APPELLANT FROM THE STORAGE UNIT CONTEMPORANEOUSLY WITH APPELLANT REQUESTING ACCESS TO THE FACILITY TO HAVE HER EXPERT WITNESS CONDUCT AN INVESTIGATION, WHEN SAME WAS CLEARLY RELEVANT TO THE ISSUE OF PUNITIVE DAMAGES.**

This argument is related to Appellant's above-argument regarding the Trial Court's exclusion of Respondent's discovery responses and portions of Mr. Comfort's deposition testimony.

Appellant sought to introduce into evidence several documents—Lease Termination Letter (Plf. Exh. 7), Intent to Vacate Notice, (Pfl. Exh. 8), Email re: Expert Inspection of Respondent's Premises, and a Unit Vacating Checklist—all of which the Trial Judge ruled inadmissible. Appellant argued that these documents were relevant to both the credibility of Respondent's witnesses and, even more so, to the issue of punitive damages. Essentially, these documents show that Respondent evicted Appellant from her rental unit on the same day, or within days, of when her expert examined Respondent's premises in preparation for trial. Appellant argued that these documents were relevant to show that Respondent continued to hinder Appellant's pursuit of her claim after her injury and that Respondent's reprehensible conduct towards Appellant remained on-going. These documents are in the same line of evidence as Appellant's proof that Respondent instructed one of its employees to "get rid of" the photographs taken of Appellant after her injury, which the Trial Court allowed in. Specifically, they are relevant to the following punitive damages factors: Respondent's reprehensibility and culpability; the duration of Respondent's conduct, and Respondent's attempts at concealment. See Gamble, 305 S.C. at 111-12, 406 S.E.2d at 354; Gore, 517 U.S. at 575, 116 S. Ct. at 1598-99, 134 L. Ed. 2d at 826. It was contradictory and in error for the Trial Court to exclude this evidence related to Respondent's reprehensibility and course-of-conduct, but then to allow the issue of punitive damages to proceed to the jury.

**III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANT'S POST-TRIAL MOTION FOR NEW TRIAL *NISI ADDITUR*, BECAUSE THE JURY'S VERDICT FAILED TO TAKE INTO ACCOUNT, AMONG OTHER THINGS, APPELLANT'S PAIN AND SUFFERING AND SCARRING.**

"When the jury's verdict is inadequate or excessive, the trial judge has the discretionary power to grant a new trial *nisi*." Waring v. Johnson, 341 S.C. 248, 256, 533 S.E.2d 906, 910 (Ct. App. 2000). While a trial court is forbidden to "substitut[e] its judgment for that of the jury," the trial court "may give the party an option in the way of *additur*." Id. at

257, 533 S.E.2d at 911. "[A] motion for a new trial *nisi additur* requires the court to consider the adequacy of the verdict in light of the evidence presented," and the court may order a "new trial *nisi additur* . . . when the verdict is merely insufficient based on the evidence." Id. A trial court's decision to grant or deny a motion for a new trial *nisi additur* will not be reversed on appeal absent an abuse of discretion. Id. at 258, 533 S.E.2d at 911-12; Todd v. Joyner, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (Ct. App. 2007).

In Waring, this Court affirmed the trial court's grant of a new trial *nisi additur* where the jury awarded "exactly the amount of [the plaintiff's] medical expenses, to the penny." Waring, 341 S.C. at 260, 533 S.E.2d at 912. The Court concluded that "[t]he jury [had] failed to consider [the plaintiff's] pain and suffering in reaching its verdict." Id. The defendant in Waring attempted to argue that the "verdict may have been intended to represent a portion of [the plaintiff's] medical expenses, plus pain and suffering," but this Court found that argument "patently untenable" and held that "[t]he jury's award of exactly the amount of [the plaintiff's] medical expenses, *to the penny*, is an attempt to reimburse her for those very expenses." Id. (emphasis added). More recently, in Todd v. Joyner, this Court again examined a motion for a new trial *nisi additur* where "[t]he jury awarded [the plaintiff] . . . her exact medical costs." Todd, 385 S.C. at 518, 685 S.E.2d at 618. While the Court in Todd ultimately affirmed the trial court's denial of the motion for new trial *nisi additur*, the Court specifically concluded that the jury's verdict was supported by the evidence of "the relatively low impact of the collision along with [the plaintiff's] limited injury immediately following the accident." Id.

In the case at bar, there is no dispute that the accident in which the Appellant was involved was a serious accident resulting in a serious injury. Appellant introduced into evidence medical bills and expenses incurred as a result of the accident in question that totalled the sum of $246,068.42. The jury, just as in Waring, then determined that Appellant

had actual damages in that exact amount, "to the penny." However, also like the Waring case, Appellant additionally had submitted evidence and testimony of the pain and suffering she endured as a result of the accident and subsequent surgeries, as well as the permanent scarring to her ankle and leg.

The specific award of $246,068.42 manifests the jury's clear "attempt to reimburse" Appellant for all of her medical expenses. Waring, 341 S.C. at 260, 533 S.E.2d at 912. Moreover, the verdict also clearly indicates that the jury concluded that all of Appellant's medical bills and expenses were the direct and proximate result of Respondent's negligence, as the jury attempted to reimburse Appellant for the total amount of those medical expenses. Thus, despite the trial court's instructions to the contrary, the jury's verdict of only the related medical expenses clearly failed to take into account Appellant's pain and suffering, alteration of lifestyle, psychological trauma, mental anguish and distress, apprehension, anxiety, emotional injury, depression, loss of enjoyment of life, permanent impairment and scarring. Appellant testified to and submitted evidence of these additional elements of actual damages and none of the aforementioned elements of damages were disputed by Respondent. Because the jury's verdict failed to account for these elements of Appellant's damages, the trial court abused its discretion when it denied the motion for new trial *nisi additur*.

**IV. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO GRANT THE APPELLANT A NEW TRIAL ABSOLUTE BASED UPON THE MISCONDUCT OF MEMBERS OF THE JURY RENDERING SAME UNFAIR AND BIASED AGAINST APPELLANT, OR IN THE ALTERNATIVE, FAILING TO CONDUCT A HEARING TO INQUIRE INTO THE EXTENT OF PREJUDICE OF THE JURORS OR THE EFFECT OF THE JUROR'S COMMENTS ON THE REMAINING MEMBERS OF THE JURY.**

**A. The Trial Court erred and abused its discretion when it failed to grant a new trial absolute based on a juror's intentional concealment of bias during voir dire, or in the alternative, it erred by failing to conduct a hearing to inquire into whether the concealment was intentional.**

"The trial court must grant a motion for a new trial based on a juror's failure to disclose information requested during voir dire 'when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges.'" State v. Miller, 398 S.C. 47, 50, 727 S.E.2d 32, 34 (Ct. App. 2012) (emphasis added) (quoting State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001)). On appeal, a trial court's "ruling on a new trial motion will not be disturbed absent an abuse of discretion amounting to an error of law." Miller, 398 S.C. at 50, 727 S.E.2d at 34.

In Woods, the Supreme Court held that "intentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." Woods, 345 S.C. at 587, 550 S.E.2d at 284. "[W]hether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis." Id. at 588, 550 S.E.2d at 284. However, "[w]here a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial." Id.

In our case, at least one (1) juror intentionally concealed the bias she held against Appellant's trial attorney and that concealment prejudiced Appellant. Shortly after the jury rendered its verdict, the foreperson, Mrs. Dale Cole, provided Appellant's attorney with an affidavit, in which she stated the following:

> I did not know we had such bias jurors until we went into deliberating. . . . One of the jurors stated she could not stand Kevin Barth and Ms. Sue Lynch was getting nothing. I told her she could not punish her for not like[]ing Mr. Barth. She said she did not care we would sit there until doomsday she wasn't going to get anything . . . .

(Aff. of Juror). Upon learning of this juror's comments, Nicholas Lewis, one (1) of the undersigned's law partners, checked our law firm's records and discovered, upon information

and belief, that this juror referenced in the affidavit was the adverse party in a domestic litigation in which the undersigned's law firm represented her now ex-husband. (See Aff. of N. Lewis). After hearing from trial counsel for both Appellant and Respondent at a post-trial hearing, the Trial Court concluded that the foreperson's affidavit should not be considered, that there was no evidence of intentional concealment, and that Appellant's Motion for New Trial should be denied. These ruling were in error.

First, Rule 606(b) of the South Carolina Rules of Evidence specifically provides that "a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Moreover, Rule 606(b) then further contemplates that a juror's testimony on these matters can be received through an "affidavit." The South Carolina Supreme Court has recognized that "juror testimony can normally be used" when "extraneous influence is alleged," and that juror testimony regarding "internal misconduct" is even allowed "when necessary to ensure due process, i.e. fundamental fairness." State v. Hunter, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995). Here, Mrs. Cole's Affidavit touches on the precise topics for which Rule 606(b)'s exceptions were created. Mrs. Cole's Affidavit references another juror's intense dislike for Appellant's trial attorney, and indicates that said bias was announced to the entire jury. Thus, the Trial Court erred when it ruled that Mrs. Cole's Affidavit should not be considered under Rule 606(b).

Second, regardless of whether the Trial Court considered Mrs. Cole's Affidavit, the Trial Court still erred when it concluded there was no intentional concealment. The fact remains, as Mr. Lewis's Affidavit states, our law firm represented the now ex-husband of one (1) of the jurors in their previous domestic litigation. This type of relationship should have been revealed by this juror during voir dire, and the juror's failure to reveal this information amounts to intentional concealment. "Intentional concealment occurs when the question[s]

presented to the jury . . . [were] reasonably comprehensible to the average juror and the subject of the inquiry [was] of such significance that the juror's failure to respond [was] unreasonable." Woods, 345 S.C. at 587, 550 S.E.2d at 284. Here, the Trial Court asked, "Is there any member of the jury panel related by blood, connected by marriage or have a close personal or social relationship with any of the attorneys involved in this case[?]," (Trial Tr. 9), and then, "Does any member of the jury panel have any type of business relationship . . . with the law firms of Ballenger, Barth & Hoefer, Baker, Ravenel & Bender, or Ellis Lawhorne & Sims?," (Trial Tr. 11). Both questions were "reasonably comprehensible," as after each of the questions at least one (1) other member of the jury pool stood and responded. One jury pool member, Mr. Timothy Thompson, stated that "Mr. Barth was [his] divorce attorney." (Trial Tr. 9), and the other, Mr. Jerry Burns, indicated that "[his] wife had a lawsuit against" one of Mr. Barth's law partners "years ago," (Trial Tr. 11). The Trial Court then set both jurors aside for purposes of this case. Presumably the juror in question sat in the courtroom, heard these same questions asked, witnessed these two (2) other individuals stand and express that they had dealings with the undersigned's law firm in the past, watched the Trial Court remove them from the jury pool, and then she chose to remain silent knowing good-and-well that she previously had been on the other side of a lawsuit from the undersigned's law firm. While Appellant contends these voir dire questions were easily comprehensible on their own, this fact is bolstered by the fact other jury pool members heard the same questions, comprehended them, and properly responded. The Trial Court erred in finding no intentional concealment.

Third, the juror's previous relationship with the undersigned's law firm, a fact that she intentionally concealed, "would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." Woods, 345 S.C. at 583, 550 S.E.2d at 284. As a matter of fact, the Trial Court in this case recognized the materiality of

this type of relationship. The Trial Court removed from the jury pool the two (2) jurors who answered honestly the voir dire questions. Most notably, the Trial Court still struck potential juror Thompson even after the undersigned indicated that he had not represented him in years, stating the following: "I'm not going to let him serve. . . . I mean that puts [Mr. Thompson] in a bad situation . . . if he were to get put on the jury. He may or may not have been happy with you [Mr. Barth]." (Trial Tr. 10). Similarly, the Trial Court also "set aside" potential juror Burns where all the Court knew was that Burns's wife had previously been on the other side of a lawsuit from one (1) of the undersigned's law partners. (Trial Tr. 11-12, 16-17). Presumably, if the juror in question had responded honestly to the Trial Court's questions, she would have been "set aside" along with Thompson and Burns. Moreover, the Court of Appeals recently recognized the materiality of this type of relationship. In State v. Miller, a juror in a criminal trial did not reveal during voir dire that she had been a witness for the same solicitor's office in a previous case. Miller, 398 S.C. at 49, 727 S.E.2d at 33. The Court of Appeals noted that the purpose of the relevant voir dire question "was to identify potential jurors who may be biased for or against . . . prosecutors, defense attorneys, or law enforcement officials." Id. at 51, 727 S.E.2d at 34 (emphasis added). Thus, the Court concluded that the "mere existence" of such a relationship was "significant." Id. at 52, 727 S.E.2d at 35.

In sum, the juror in our case intentionally concealed the material and significant fact that she had a previous relationship with the undersigned's law firm, and the Trial Court erred and abused its discretion when it failed to grant a new trial absolute on this basis.

In the alternative, at the very least, the Trial Court should have conducted a post-trial hearing to determine if this particular juror did, in fact, intentionally conceal her previous relationship with the undersigned's law firm, and the Trial Court erred when it failed to do so. The Supreme Court of South Carolina has expressly held that "whether a juror's failure to

respond is intentional is a fact intensive determination." Woods, 345 S.C. at 588, 550 S.E.2d at 284. "Ordinarily, the juror's testimony is part of the basis of that determination." Miller, 398 S.C. at 54, 727 S.E.2d at 36. The Court of Appeals recognized that "Woods [] support[ed] a subjective analysis, in addition to an objective one, in which the trial court considers the testimony of the juror if it is reasonably available." Id. In Miller, the Court of Appeals concluded that "[b]ecause the juror . . . did not testify, potentially important facts [were] missing from the record before [it]," and ultimately remanded the case "to the trial court to determine whether the juror intentionally concealed the information." Id. at 55, 727 S.E.2d at 36. In our case, the information regarding the juror's possible intentional concealment was revealed to the undersigned and presented to the Trial Court less than one (1) week after the conclusion of the trial. At that time, the Trial Court could have easily required that juror to come back to court to testify at a post-trial hearing. Had the Trial Court done so, a specific finding on intentional concealment could have been made at that time and after receiving additional evidence. The Trial Court's refusal to conduct such a post-trial hearing was an abuse of discretion.

**B. The Trial Court erred and abused its discretion when it failed to grant a new trial absolute based on juror misconduct causing the verdict to be the result of passion, caprice, prejudice or some other influence outside of the evidence, or in the alternative, by failing to conduct a post-trial hearing to determine the extent of prejudice of the jurors or the effect of the jurors' inappropriate statements on the remaining members of the jury.**

"...In all civil cases any party shall have the right to demand a panel of twenty competent and impartial jurors from which to strike a jury". S.C. Code Ann. § 14-7-1050. If a potential juror has an interest in the lawsuit such that she is "not indifferent in the cause", the juror shall be deemed incompetent to serve on the jury". Vestry and Church Wardens of Church of Holy Cross v. Orkin Exterminating Company, Inc., 384 S.C. 441, 682 S.E.2d 489 (2009), quoting S.C. Code Ann. §14-7-1020.

"A litigant's right to an impartial jury is a fundamental principle of our legal system." Burke v. AnMed Health, 393 S.C. 48, 52, 710 S.E.2d 84, 86 (Ct. App. 2011) (citing S.C. Code Ann. § 14-7-1050 (2008); Vestry, 384 S.C. at 446, 682 S.E.2d at 492. Appellant concedes that not all juror misconduct should give rise to a new trial. Instead, before a new trial should be granted, the "misconduct of the jury must relate to a material matter is dispute and must be such as to indicate an influence of bias or prejudice in the minds of the jurors". Vestry, 384 S.C. at 447, 682 S.E.2d at 493 (quoting C.J.S. New Trial § 54 (1998)). In order to determine the extent of the prejudicial effect of the juror's misconduct, the trial court should consider three factors: "(1) the number of jurors exposed, (2) the weight of the evidence properly before the jury, and (3) the likelihood that curative measures were effective in reducing the prejudice. State v. Elgin, 398 S.C. 39, 45, 726 S.E.2d 231, 234 (Ct. App., 2012). On appeal, "[t]he circuit court's finding will not be disturbed absent an abuse of discretion." Id.

The Appellant is informed and believes the verdict rendered in this matter is so grossly inadequate that it was the result of passion, prejudice, caprice, and matters outside of the evidence presented at trial, specifically the comments made by two (2) jurors during their deliberations.

Shortly after the verdict was rendered, the foreperson provided the Court with an Affidavit indicating her concerns over the comments that were made by various jurors during the jury's deliberations. The two comments that Appellant contends biased and prejudiced the jury against the Appellant were the comments regarding a juror's intense dislike for Appellant's attorney and a comment from a juror and bank employee to the effect that Appellant did not need the money because she "had a large bank account and did not need the money." (Aff. of Juror).

The Trial Court began by concluding that the foreperson's Affidavit should not be considered. This was in error. As discussed above, Rule 606(b) of the South Carolina Rules of Evidence specifically provides that "a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Again, the South Carolina Supreme Court has recognized that "juror testimony can normally be used" when "extraneous influence is alleged," and that juror testimony regarding "internal misconduct" is even allowed "when necessary to ensure due process, i.e. fundamental fairness." Hunter, 320 S.C. at 88, 463 S.E.2d at 316. Here, Mrs. Cole's Affidavit touches on the precise topics for which Rule 606(b)'s exceptions were created. Mrs. Cole's Affidavit states that one (1) juror announced to the jury her intense dislike for Appellant's trial attorney and another juror told the entire jury that Appellant did not need money because she had a large bank account. These statements, the bank account statement in particular, related to information that was not in evidence. Thus, the Trial Court erred when it ruled that Mrs. Cole's Affidavit should not be considered under Rule 606(b).

Moreover, the Trial Court, in considering the Appellant's Motion for a New Trial Absolute based upon these comments during the deliberations, indicated that the foreperson's Affidavit did not clearly indicate the nature of the other juror's dislike of Appellant's attorney, nor the basis for the bank teller's knowledge of Appellant's alleged bank account balance. As a result, the Trial Court did not believe the comments amounted to sufficient misconduct to warrant a new trial. Although the Appellant respectfully disagrees with the Court's determination on this issue, at a minimum the Court should have had the various jurors appear before the Court to testify regarding the source of their comments and the nature and extent of their bias or prejudice, and have the remaining jurors testify regarding the impact those comments had upon their deliberations.

In the case at bar, it is undisputed that the comments being complained of by the Appellant were heard by the entire deliberating jury, and that no curative instructions were given since the issue was not brought to anyone's attention until after the verdict was rendered and the jury was dismissed. It would therefore appear to boil down to the extent of influence and prejudice the comments made upon the jurors that were deliberating. In order to determine that, Appellant contends that, at a minimum, a hearing should have been convened, at which time the jurors could have been examined under oath regarding these issues. Instead, the Trial Court in this case dismissed the Motion for New Trial Absolute summarily without conducting any investigation into the allegations and without taking the testimony of any of the jurors, including the forelady who provided the Court with the Affidavit.

In State v. Bantan, 387 S.C. 412, 692 S.E.2d 201 (Ct. App., 2010), after the jury began deliberations, the foreperson notified the Trial Court that a juror commented on the Defendant being "targeted" by law enforcement and that the foreperson was concerned "that by hearing this comment, this juror may not be capable of providing an unbiased opinion based solely on the evidence". Id. at 421, 692 S.E.2d at 205. In that case, the trial judge immediately stopped the jury from deliberating and conducting an "on the record interview in chambers with the foreperson, Rosella Jones, and the juror involved, Mr. Gladden." Id. The trial judge then questioned each juror to determine whether or not each juror could disregard the comment and render a verdict solely based on the evidence presented. Id. at 421-22, 692 S.E.2d at 206. Additionally, the trial judge specifically instructed each juror to disregard the comments. Id. at 422, 692 S.E.2d at 206. In affirming the trial judge's decision not to grant a mistrial, the Court of Appeals specifically noted that "the trial court in this case interviewed the jurors and was satisfied each one could reach a fair and impartial verdict." Id. at 423, 692 S.E.2d at 207.

More recently, in State v. Elgin, 398 S.C. 39, 726 S.E.2d 231 (Ct. App., 2012), a juror improperly spoke with her mother during deliberations. The defendant was found guilty and a Motion for New Trial was made based upon the juror's misconduct. See id. at 40, 726 S.E.2d at 232. Again, the trial court held a hearing on Defendant's Motion and took sworn testimony from the juror regarding the improper conversation. Id. at 44, 726 S.E.2d at 234. The juror testified, under oath, that she did not tell other jury members of her improper conversation. Id. at 45, 726 S.E.2d at 235. The trial court ultimately denied the defendant's Motion for New Trial. Id. at 44, 726 S.E.2d at 234. In affirming that denial on appeal, the Court of Appeals deferred to the circuit court's decision to deny same, but noted importantly that the trial judge made the decision to deny the Motion after "separately interview(ing) this juror under oath, and was satisfied she had reached a fair and impartial verdict". Id. at 46, 726 S.E.2d at 235. The Court of Appeals also referenced the Bantan decision and indicated that "broad deference" should be given the trial court in determining the credibility of the juror. Id. (citing Bantan, 387 S.C. at 423, 692 S.E.2d at 206). Appellant submits that the only way to determine the credibility of a juror, and thus be entitled to the "broad deference", is to see and hear the juror, on the record and under oath. That credibility determination simply cannot be made when the Trial Judge does not question the juror at all.

It should also be noted, that the Supreme Court reversed the Court of Appeals' grant of a new trial and affirmed the trial court's denial of a new trial Motion based on juror misconduct in Vestry & Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co., 384 S.C. 441, 446, 682 S.E.2d 489, 492 (2009). Although the Appellate Court's disagreed on the ultimate decision regarding the new trial, each opinion clearly noted that the trial judge conducted an extensive inquiry into the misconduct, and had held a hearing to question all of the jurors regarding the alleged misconduct. See Vestry, 384 S.C. at

448, 682 S.E.2d at 493; Vestry & Church Wardens of the Church of Holy Cross v. Orkin Exterminating Co., 373 S.C. 200, 203, 644 S.E.2d 735, 736 (Ct. App. 2007).

In sum, the Trial Court in our case was presented with evidence—i.e., the foreperson's Affidavit—showing that the other members of the jury were exposed to juror misconduct in the form of external information being presented to the entire group during deliberations. This information included a bank-employee juror informing the remaining members of the jury that Appellant did not need money because she already had "a large bank account." (Aff. of Juror). This "external" information should have never been conveyed to the remaining members of the jury. Despite this evidence of juror misconduct, the Trial Court summarily concluded that no misconduct occurred, and thereby failed to consider and analyze any of the three (3) required factors to "assess the prejudicial effect of an allegation of juror misconduct due to an external influence." Elgin, 398 S.C. at 45, 726 S.E.2d at 234. In addition, the Trial Court also erred by refusing to conduct a post-trial hearing to determine the scope and effect of the misconduct on the entire jury.

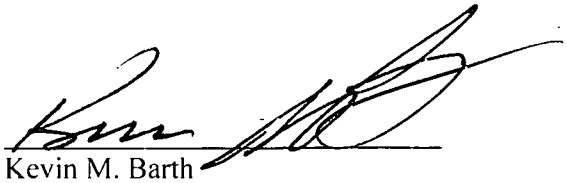
## V. EVEN IF NO ONE ERROR ALONE WARRANTS A NEW TRIAL, THE CUMULATIVE EFFECT OF THE MULTIPLE ERRORS DEPRIVED APPELLANT OF A FAIR TRIAL.

The "cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial . . . ." State v. Johnson, 334 S.C. 78, 92, 512 S.E.2d 795, 803 (1999) (citing Tennant v. Marion Health Care Found., 194 W. Va. 97, 459 S.E.2d 374 (1995)). However, an appellant "must demonstrate more than error in order to qualify for reversal" under the cumulative error doctrine. Johnson, 334 S.C. at 92, 512 S.E.2d at 803. To warrant relief under this doctrine, "[t]he errors must adversely affect [the appellant's] right to a fair trial." State v. McEachern, 399 S.C. 125, 149, 731 S.E.2d 604, 617 (Ct. App. 2012).

Appellant contends that her trial was flawed from the very outset. The errors in her trial began in voir dire and did not conclude until the Trial Court committed the final error by denying her post-trial motions for a new trial. As set forth in this brief, the errors in this matter included the exclusion of relevant evidence relating to credibility and punitive damages, concealment of bias by jurors, external evidence being presented to the jury during deliberations, the Trial Court's refusal to conduct a post-trial hearing and then it ultimately denying Appellant's post-trial motions. Every litigant has the right to a fair trial and, more importantly, an impartial jury. In this matter, error upon error occurred until Appellant was finally stripped of those rights. If this Court is not persuaded that any one error warrants a new trial, the cumulative effect of those errors certainly should warrant such.

## CONCLUSION

Based on the foregoing, the Appellant respectfully submits that this Court should reverse the Trial Court's denial of Appellant's Motions and remand this matter to the Trial Court for the issuance of a New Trial Nisi Additur Order, or in the alternative remand the matter to the Trial Court for a new trial absolute.



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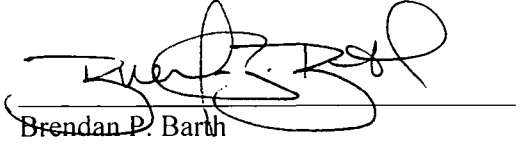

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